No. 3021

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HENRY SORENSON,

Appellant,

vs.

ALASKA STEAMSHIP COMPANY, a Corporation,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF WASHINGTON, WESTERN DISTRICT, NORTHERN DIVISION.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Appellee, Alaska Steamship Company, has filed a motion to dismiss the appeal herein, or to affirm the decree of the Court below, on the grounds (1) that the record has not been printed; (2) that no copies of the record, printed or otherwise, have been served upon appellee; and (3) that the transcript of record is incomplete, in that it does not contain the

testimony taken in open Court, the same not having been certified by the Court below.

Appellee feels that this motion is well taken and must be granted by this Court.

Without waiving this motion or any of appellee's rights thereunder, we desire, in case this Court should deny said motion, to present this brief on the merits, in so far as it is possible to brief the case in the absence of any copy, printed or otherwise, of the record on appeal.

This is an action *in personam* for personal injuries received by appellant while employed as a seaman aboard the steamship "Victoria," owned and operated by respondent. The libel alleges that a few days previous to February 21, 1916, this steamship had taken aboard a cargo of coal in bulk at Boat Harbor, B. C. That such coal was loaded in the different compartments of said vessel so that Compartment No. 2 was filled and that *"no more coal would pass into the hold"* (paragraph V). That a pile of coal was loaded in the 'tween decks of Compartment No. 2, entirely covering the hatch between the lower hold and the between decks, so that the lower hold was shut off without ventilation. It was further alleged that said coal was damp and dusty, and being permitted to remain in such condition until February

21st, dangerous and explosive gases were found in the lower hold, which fact was unknown to appellant. The negligence charged against appellee, as contributing to the accident, was first, that appellant was *ordered* by the officers of the ship to trim the coal in No. 2 between decks *into the lower hold,* and, second, that appellee furnished appellant with an open lantern *to use in the lower hold,* which lantern upon coming in contact with the gases in the lower hold caused an explosion, with consequent injuries to appellant.

The allegations of negligence were denied in appellee's answer and contributory negligence on the part of appellant and negligence of a fellow servant affirmatively pleaded.

The case upon the pleadings presented a clear cut question of fact as to whether or not appellant was *ordered* to go into the lower hold and if so whether he was furnished with a lantern to *use in the lower hold.*

The case was tried in open Court, the witnesses being examined orally in the presence of the trial Judge, who had the opportunity of seeing the witnesses and judging of their credibility.

At the conclusion of the trial, the lower Court reserved his decision and on February 20, 1917, filed

his memorandum decision, which, for the sake of convenient reference, we will set out in full:

> "The testimony shows that several days previous to the 21st day of February, 1916, the steamship 'Victoria' was lying at Boat Harbor, British Columbia, Canada, loading coal in the hold of the vessel from bunkers by pouring it through hatch No. 2 whence it fell through similar hatchways in the steerage deck and on the deck above the lower hold; that the hatchways were of the same size and located one directly above the other; that the coal was poured through the hatches continually to the lower hold, where fifteen men were stationed around the hatch and shoveled the coal to the sides of the vessel and around the hatch until all of the space from the sides of the vessel and around the hatch had been filled, so that the coal rolled to a line immediately below the sides of the opening of the hatch; whereupon the men came to the between decks and permitted coal to pour through the hatch into the lower hold until the hatch was filled and was sealed by the professional sealers who were in charge of loading the coal. That at the time the hatch was sealed, a circular 'V' shaped opening was formed around the hatch, about five feet wide at the top and about four or five feet deep at the deepest point. When the lower. hold was filled and the hatch sealed, about twenty or twenty-five tons of coal was dumped into the hatch, the apex of this coal reaching to a point above the level of the steerage deck. This apex was trimmed down and the steerage hatch cover placed over the hatch, and the vessel proceeded thence to Seattle. On the morning of the 21st of February, 1916, at 7 o'clock a. m., libellant was ordered by the boatswain into the between decks with other seamen to trim this pile of coal into the wings of the

'tween decks, and aft of the hatch of the 'tween decks, leaving a small space for an additional cargo. Libellant testified that they were directed to do this work in the best way they could. The boatswain testified that the order was 'to go into the 'tween decks and trim the coal into the wings and aft.' The testimony further shows that electric lights were furnished on the boat, and that lanterns were also furnished. These lanterns were trimmed and lighted by persons employed on the vessel, and placed in suitable positions for use; that no specific order was given to take the lanterns instead of using the electricity. The lantern was taken by libellant and his fellow servants into the 'tween decks and hung at places suitable to shed light upon the place where they were working. The coal, instead of being thrown to the sides of the vessel in the 'tween decks, was thrown to a point about half way between the hatch and the side of the vessel, and when the place to which it was thrown had been filled to the steerage deck, the coal rolled back to the place from which it had been shoveled. An open space still remained from the sides of the ship to the place where the coal was thrown of some six or eight feet from the full space between decks. The libellant and fellow seamen, instead of shoveling the coal to the sides of the vessel and filling the wings and aft, dug a hole through the hatch leading to the 'V' shaped opening in the hold of the vessel, and the libellant being the smallest man of the seamen, went through this opening thus made into the open triangular space, and while there, asked that a light be handed him; whereupon a light was passed to him by a fellow seaman, and when taken into this space the explosion followed. There is some testimony with respect to the defective ventilation of the hold of the ship. The testimony further shows that an explosion from coal gas within the time that this

coal was loaded upon the vessel was an 'unusual and unheard of occurrence.' In view of the conclusion which is forced from the testimony which is before the court, it is not necessary to discuss the ventilation of the hold of the ship.

"It is fundamental that a servant assumes all of the ordinary and usual risks and perils incident to which he has accepted employment, and also risks which reasonable care would disclose to exist. The servant does not assume risks that are created by the Master's negligence; nor such as are latent, and not discovered until the time of the injury. *The Themistocles,* 235 Fed. 81.

"It is contended by the libellant that the explosion being unforeseen and unexpected in its nature, and occurring in the manner in which this transpired, that negligence would be presumed, if unexplained, and the burden is cast upon the respondent to satisfactorily explain. *Beall v. Seattle,* 28 Wash. 593; *Agnew v. U. S.,* 165 U. S. 36.

"The contention of the libellant would have force if the libellant was at a place where he was directed to be. The testimony, I think, is conclusive that the trimming of the lower hold had been fully completed by professional trimmers at Boat Harbor. I think all of the circumstances confirm the positive testimony of the respondent that no authority was given to the seamen to disturb the lower hold. The acts with relation to the sealing of the lower hold having been done by professional sealers, men engaged for that special service, and the condition of the space in the lower hold being a small 'V' shaped opening in which but little coal could be placed, in the absence of testimony of any direction to the men to go into the place, I think the fact is conclusively established that no direction can be attributed to the order of the boatswain, any reasonable construction of which would lead a man into the lower hold, and this is further confirmed by the

large space into which the coal could be placed on the 'tween decks. The act of libellant in going into this small space in the hold of the ship was an act purely voluntary, without suggestion on the part of his superiors, and libellant is not entitled to recover an indemnity for negligence of the Master upon this occasion. Recovery, however, may be had for maintenance and cure. It is the law of the sea that recovery may be had for wages, maintenance and expenses of cure by a seaman injured on a vessel in the service of which he is engaged. *The Osceola,* 189 U. S. 158. It is the uniform rule of admiralty that a seaman injured in the service of a ship is entitled to maintenance and cure and wages, at least to the end of the voyage, irrespective of the question of negligence. *The Santa Clara,* 206 Fed. 179.

"The Act of March 4, 1915, 38 Stat. 1185, is merely a provision fixing the status of injured seamen in command of vessels with relation to other employees on the ship, and provides that 'seamen having command shall not be held to be fellow servants with those under their authority.'

"No recovery can be had for indemnity, and the only liability which exists is for any unpaid wages, and for maintenance and cure."

After the filing of this decision, appellant moved for a rehearing, which was granted and the case was again fully argued, at the conclusion of which, the lower Court adhered to his decision of February 20th, 1917, and entered judgment of dismissal, excepting as to maintenance and cure which was allowed appellant. This appeal was taken some five months later.

As this appeal, if allowed, presents questions of fact only, this Court will readily recognize our diffi-

culty in preparing this brief, when it considers that the case was tried below, in open Court, on January 30 and 31, 1917, and that since said date neither appellee, nor its proctors herein, have been served with or had an opportunity of reading the stenographer's transcription of such oral evidence, only two copies of which we understand have been transcribed for the purpose of this appeal. Nor have we been refreshed any by a careful reading of the so-called *"digest"* of testimony set forth in appellant's brief. This practice of garbling testimony to suit a litigant's needs has never been encouraged by appellate courts. Appellant eliminates essential portions of the answers of witnesses and by such elimination attempts to connect up unrelated sentences with the very apparent purpose of misleading this Court as to the real essence of such witnesses' testimony, the net result being an undigested mass of no benefit whatsoever.

Fortunately, we are relieved of the burden of attempting to point out the inaccuracies and misstatements contained in Appellant's Brief.

As we have heretofore stated, this cause was tried in open Court, practically all of the witnesses having appeared and testified before the trial Judge. If the trial Court's findings as to the facts are accepted as true, his conclusions of law will not be disputed. In fact, we understand appellant's sole contention on

this appeal to be that the trial Court's findings of fact are contrary to the evidence.

The rule announced by this Court in *The Alijandro,* 56 Fed. 621, at page 624:

> "The rule is well settled in cases on appeal in admiralty when the questions of fact are dependent upon conflicting evidence, the decision of the District Judge who had the opportunity of seeing the witnesses and judging their appearance, manner and credibility will not be reversed unless it clearly appears that the decision is against the evidence. *The Albany,* 48 Fed. 565, and authorities there cited,"

has been uniformly followed by this Court in later decisions.

Whitney v. Olsen, 108 Fed. 292.
Jacobsen v. Lewis etc. Co., 112 Fed. 73.
Alaska Packers' Ass'n. v. Dominico, 117 Fed. 99.
The Oscar B., 121 Fed. 978.
Paauhau v. Palapala, 127 Fed. 920.
The Samson, 217 Fed. 344.
Stern v. Fernandez, 222 Fed. 42.
The Dolbadarn Castle, 222 Fed. 838,

and has recently been reaffirmed and followed in the case of *The Hardy,* 229 Fed. 985, at p. 986 (opinion by Circuit Judge Gilbert):

> "While there are many features of the evidence which tend to discredit the testimony of the officers and men of the Hardy, and tend to prove that on the night of the 5th, or during the daylight of the 6th, the lantern on the barge might

> have been lighted without danger to the men, and that in fact no watch was kept of the barge on the night of the 6th, we are not convinced that the record is such as to take the case out of the well settled rule, which has been followed by this and other Courts, that in cases on appeal in admiralty when questions of fact are dependent upon conflicting testimony, the decision of the District Judge, who had the opportunity to see the witnesses and judge of their appearance, manner and credibility, will not be reversed, unless it clearly appears to be against the weight of the evidence. *The Alijandro*, 56 Fed. 62, 6 C. C. A. 54; *Perriam v. Pacific Coast Co.*, 133 Fed. 140, 66 C. C. A. 206; *Peterson v. Larsen*, 177 Fed. 617, 101 C. C. A. 243,"

and such is the uniform rule in other Circuits.

> *The Glendale*, 81 Fed. 633.
> *The Sappho*, 94 Fed. 545.
> *The Frey*, 106 Fed. 319.
> *Lazarus v. Barber*, 136 Fed. 534.
> *Memphis etc. Co. v. Hill*, 122 Fed. 246.
> *The Elenore*, 217 Fed. 753.

That the above rule is applied to personal injury causes brought in admiralty is held in *The Elenore*, 217 Fed. 753.

Appellant's contention seems to be that the decree below should be reversed, if there was evidence to sustain appellant's action. Under the above rule, however, the sole question before this Court is whether or not there is evidence to *sustain the lower Court's findings*. As to this we think there can be no doubt.

Much of the evidence produced in open court is

not referred to in appellant's brief. Whether it is in the record or not we have no way of ascertaining, in the absence of any copy thereof.

It will be noted that appellant alleges in his libel that Compartment No. 2 was filled and that "no more coal would pass into the hold," which is conclusive on his present argument that the lower hold was only partially filled. Sufficient to say that the master, mate and a Mr. Muirhead (charterer) all testified that the lower hold had been loaded by professional trimmers at Boat Harbor, B. C., so far as it was possible to stow coal therein and still permit space for the trimmers to work in such hold. The space occupied by such trimmers is the "V" shaped space referred to by the lower Court. After the hold had been finished only twenty to twenty-five tons of coal remained on the dock for loading; the trimmers were called out of the hold and the hold was *"sealed"* by running this twenty to twenty-five tons into the hatch opening between the 'tween decks and the lower hold, which coal filled the hatch opening and spread out in the 'tween decks in a pyramid, the apex being some six feet high. These facts are not disputed, nor do we consider them of importance on this appeal. If the appellant was not ordered to work in this lower hold with an open lantern, the conditions in such lower hold do not enter into the case.

It is elementary law that a Master's duty in respect to furnishing his servants a safe place in which to work extends only to such part of his premises as he has prepared for the use of his servant, or into which he has ordered his servant to go.

Labatt's Master and Servant, §1558.
Note (6) and cases there cited.

On the question of the orders which appellant received on the morning of the accident the evidence, as we clearly remember it, is conclusive. By reference to brief written by us immediately after the trial below for use of the trial Judge, we find that appellant himself testified that on the morning of February 21, 1916, he was ordered by McDonough, the boatswain, to go into the between decks and trim this pyramid of coal into the *wings of the between decks and aft of the hatch on the between decks,* and leave a small space forward for additional cargo. He testified that he was to do this work in the *best way* he could, but in view of his express orders as to his place of work this qualification is of no avail. The Boatswain McDonough testified, on behalf of appellant, that the order which he received from the mate Johnson was to have the seamen, including appellant, *"go into the between decks and trim the coal into the wings and aft" on the between decks,* and that he gave that order to the seamen, including appellant. This order

is confirmed by Captain O'Brien, master of the "Victoria," who gave the order to the mate, and is also confirmed by the mate who passed the order to the boatswain. In view of appellant's admission that this was the order given the seamen by the boatswain, the evidence would seem not only to confirm the lower Court's finding, but in fact to be uncontradicted.

Appellant's only excuse for going into the lower hold was (according to this testimony) because of the fact that the between decks were filled and the coal was running back into the hatch. That this testimony is absolutely untrue is shown by the testimony of Mate Johnson that the between decks would hold from 300 to 400 tons; that after the accident he walked between the coal pile around the hatch and the sides of the ship, which was entirely clear of coal; by the testimony of Muirhead (charterer) that the between decks would hold 450 tons of coal, and by the testimony of Boatswain McDonough (appellant's witness), that the 'tween decks would hold 250 tons of coal and that after the accident he went into the between decks and walked between the pile of coal around the hatch and the sides of the ship, as well as in the after part of this deck. As there were only from 20 to 25 tons of coal in the between decks originally, it is clear from this testimony that there was ample space in the between decks to stow this amount of coal without

resorting to the lower hold. The lower Court's finding on this point is also amply sustained by the testimony and is, in fact, not contradicted.

On the remaining point as to the use of lanterns, the testimony is even more conclusive in favor of the lower Court's finding. If, in fact, the appellant was not ordered into the lower hold, and he does not testify that he was so ordered, it is apparent that he could not have been directed to use an open lantern in the lower hold. As we remember the testimony, not a single witness testified that the seamen were ordered to use these lanterns in the lower hold.

The lower Court's findings that:

> "The testimony further shows that electric lights were furnished on the boat, and that lanterns were also furnished. These lanterns were trimmed and lighted by persons employed on the vessel and placed in suitable positions for use; that no specific order was given to take the lantern instead of using the electricity. The lantern was taken by libellant and his fellow servants into the 'tween decks and hung at places suitable to shed light upon the place where they were working" (that is, in the 'tween decks),

is supported by the uncontradicted evidence.

Appellant makes some further contention that the vessel was unseaworthy because her lower hold was unventilated. As stated by the lower Court, this point could only enter into the case upon a showing

that appellant was *ordered* into the lower hold. As a matter of fact, the vessel's lower hold was properly ventilated. The only positive testimony on this point is that of Captain O'Brien, whose deposition is before us. He states (page 11) that there were two ventilators leading into No. 2 hold, of about 20 inches diameter, being large ventilators. The other witnesses had never made an examination and naturally were not in a position to testify positively on this point.

In view of the above mentioned rule, we do not see that any further discussion of the testimony is necessary. As stated by the lower Court, his findings are "forced from the testimony"—no other conclusion could be reached.

We will briefly note appellant's argument on the "legal" questions presented. His whole argument is based upon the erroneous presumption of fact that appellant was in the hold "working in pursuance of orders of the officers of the vessel," and that he was injured "without fault on his part." That this presumption is erroneous has been held by the lower Court whose findings are amply sustained by the evidence in the case.

Appellant contends (pp. 42-43 of his brief) that an explosion of itself creates a *prima facie* case of negligence on the part of the master. The authorities cited do not sustain appellant's contention.

It has been held by some courts that the doctrine of *res ipsa loquitur* extends to cases of boiler explosions and explosions of dynamite, powder, etc. The theory of these cases is that boilers, dynamite and other high explosives do not ordinarily explode when proper care has been exercised in handling and controlling them, and hence in the case of such an explosion where the thing causing the explosion is ordinarily under the control of the defendant, in the absence of any explanation by the defendant, there is a *prima facie* case of negligence on its part. Such a doctrine has never been sustained, excepting in cases where the instrument causing the explosion is ordinarily *under the control of the defendant,* and even in such cases it is a mere presumption and is subject to explanation or proof.

> *Lykiar Doupoulo v. New Orleans, etc. Co.,* Vol. 22 Am. & Eng. Ann. Cas. 977.

Even this doctrine is not uniformly applied by the courts. See note to the last case.

Such a doctrine, however, is never applied in cases of an accident where the instrumentality is either in whole or in part under the control of the servant or his co-workers.

> "Plaintiff contends that the doctrine *res ipsa loquitur* applies to the facts in this case and seeks to justify his contention by citing many cases. In

all of the cases cited the courts have held that the mere fact of the accident unexplained is some evidence of negligence on the part of the defendant. The rule established in those cases is as follows: 'When the thing causing the injury is shown to be under the control of the defendant, and the accident is such as in the ordinary course of business does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its parts.' *The reason why this rule of law is not applicable to the case at bar is because of the fact that the thing causing the accident, namely, the oil being poured into the lamp, was in exclusive control of the plaintiff rather than of the defendant, and therefore the reason for the rule does not exist.*" (Italic ours.)

Courtney v. New York Etc. Co., 213 Fed. 389.

"Authorities are scarcely needed to support the propositions that except in rare cases (of which this is not one) negligence cannot be inferred from the mere happening of an accident, and cannot be conjectured but must be proved. We may refer, however, to the following decisions: *Patton v. Railway Co.,* 179 U. S. 663, * * * *Oil Company v. Van Elderen,* 137 Fed. 571, * * * *Clare v. Railroad,* 167 Mass. 39, * * * 44 N. E. 1054; *Leary v. Railroad,* 173 Mass. 373, 53 N. E. 817; *Warner v. Railroad,* 178 Mo. 125, 77 S. W. 67, and cases cited in 29 Cyc. 631, Par. 2, Note 52."

Pittsburg Coal Co. v. Myers, 203 Fed. 221, at page 224.

In any event, this doctrine could not apply to the case at bar for the reason that the testimony affirmatively shows that the accident occurred by reason of

the appellant taking an open lamp into the lower hold, contrary to express orders. The presumption of the above case as applied to injuries occasioned to third parties, to whom appellee owed some contractual duty, has never been extended to the relation of master and servant where the dangerous agency was in whole or in part under the control of the servant.

It will further be noted in this connection that appellant has neither alleged nor proven that appellee knew or should have known of the presence of coal gas in the hold.

> "In order to make the complaint proof against a demurrer, it is incumbent upon the plaintiff to allege that the use of the oil furnished to the plaintiff and the manner in which he claimed to have used it, as set forth in the complaint, was likely to cause an explosion and that the defendant knew or ought to have known of the fact."
>
> *Courtney v. New York etc. Co.,* 213 Fed. 388.

Appellant seems to contend that because Captain O'Brien testified that he had heard that an explosion occurred on the "Queen of the Pacific" some twenty years ago, he was bound to anticipate an explosion on this occasion. One explosion in twenty years, the circumstances of which are not shown, does not put appellee upon notice of the dangerous character of coal dust. All of the evidence in this case establishes that such an explosion as occurred on the "Victoria" was an "unheard of occurrence." But what-

ever the fact may be in this respect, we do not see its materiality here. If appellant had been *ordered* to work in the hold a different question would arise, but such is not the case. He went into the hold voluntarily and without notice to, or knowledge of, appellee. In the absence of negligence on the part of appellee, there can be no recovery.

> *McKenna v. Union S. S. Co.,* 215 Fed. 284.
> *Labatt Master and Servant,* pp. 2488-2490.

The case of *The Themistocles,* 235 Fed. 81, cited by appellant, merely holds that a servant does not assume the risk of a "dangerous place" in which he is *ordered* to work, where the danger was *known* to the master but unknown to the servant. Such is undoubtedly the rule but we fail to see its application in this case.

The case of *McGill v. Michigan S. S. Co.,* 144 Fed. 788, decided by this Court in 1906, is somewhat similar to *The Themistocles, supra,* in that it involves the negligence of a master in ordering a servant into a place of danger of which the master had or should have had knowledge, but of which the servant had no knowledge.

> "We do find, however, that the steamship company was negligent in putting in the fuel tank oil of the quality of that which it used, and fuel oil, no matter what its quality, during the progress of the work on the tanks and at a time when

it knew that work remained to be done in drilling holes into the tank for the insertion of top bolts to secure the stanchion, without any warning to the workmen of the Fulton Iron Works."

We do not see that it has any application here.

The last point raised by appellant should in fact have been first presented, as in our opinion it is determinative of appellant's case.

Under the admiralty law as laid down in *The Osceola,* 189 U. S. 175, all the members of a ship's crew, with the possible exception of the master, are held to be fellow servants and "hence seamen cannot recover for injuries sustained through the negligence of another member of the crew, beyond the expense of his maintenance and cure." The only exception to this rule is where the seaman is injured "in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship."

In the case at bar appellant contends that the presence of coal gas in the lower hold rendered the vessel unseaworthy under the above rule. We do not think this contention worthy of much comment. The presence of gas in a portion of the ship into which appellant was not ordered to go could not be termed unseaworthiness "in consequence" of which he was injured.

Appellant, being a seaman at the time of receiving his injuries, is restricted in his recovery to maintenance and cure (which was allowed by the lower Court), unless the admiralty rule as announced by the Supreme Court in the above case has been modified by the Act of March 4, 1915, 38 Stat. 1185, which provides that "seamen having command shall not be held to be fellow servants with those under their authority."

The lower Court held, although it was not necessary to its decision, that this act "is merely a provision fixing the status of injured seamen in command of vessels with relation to other employees on the ship," which construction in our opinion is correct.

It is not necessary, however, to base the decision in this case on the construction of this act, as appellant has entirely failed to prove negligence on the part of the appellee upon any theory whatsoever, while the active negligence on appellant's part is established beyond any controversy.

In conclusion, we wish to apologize to this Court for our failure to give any citations to the testimony of the various witnesses to which we have referred, which failure is due to the fact that we have not been served with any copy, printed or typewritten, of the record in this case.

We respectfully submit that the findings of the lower Court are fully sustained by the evidence in this case and that his conclusions therefrom are correct, and that the decree below should be affirmed.

Respectfully submitted,

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